

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

IN THE MATTER OF)
K-AIR CORPORATION, Respondent)

and)

SHEET METAL WORKERS LOCAL #67)
A/W SHEET METAL WORKERS)
INTERNATIONAL ASSOCIATION)

CASE NO. 16-CA-091326

K-AIR CORPORATION'S EXCEPTIONS TO THE ALJ'S FINDINGS

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I. EXCEPTIONS TO THE ALJ'S FACTUAL FINDINGS

Respondent excepts to the following specific factual findings and conclusions on the ground that they are not supported by the weight of the evidence in the records:

1. Respondent excepts to the ALJ's findings of fact to the extent he did not acknowledge that John Vega ("Vega") mentioned during his interview that he had been a union member at some point. (ALJD 2:6-15; TR 12:18 through TR 13:9; TR 215:6-14; and TR 237:16 through TR 238:9).¹
2. Respondent excepts to the ALJ's findings of fact to the extent he did not acknowledge that Kyle Villarreal ("Villarreal") was going out of town for business at the time he told Gilbert Garcia ("Garcia") he was going out of town. (ALJD 29-32; TR 158:2-17).
3. Respondent excepts to the ALJ's finding that Villarreal asked Vega if Brandt was a union company because Vega's testimony is inconsistent with that finding. (ALJD 3:31-33; ALJD 9:4-6; TR 24:16 through TR 25:1; TR 53:3-10; TR 66:23 through TR 67:4; TR 70:1-22).
4. Respondent excepts to the ALJ's findings of fact to the extent he did not acknowledge that Justin Reeder ("Reeder") voluntarily told Villarreal about his union-affiliation and charge against Swisher before Villarreal hired him. (ALJD 4:8-10; TR 113:13 through TR 114:19; TR 127:24 through 128:19; TR 130:4-8; TR 133:2-6; GC-5(a); GC-5(b); GC-5(c)).
5. Respondent excepts to the ALJ's finding that Villarreal "again" asked Justin Reeder ("Reeder") about his unfair labor charge against Swisher because it is inconsistent with Reeder's testimony. (ALJD 4:8-10; TR 113:13 through TR 114:19; TR 127:24 through 128:19; TR 130:4-8; TR 133:2-6; GC-5(a); GC-5(b); GC-5(c)).
6. Respondent excepts to the ALJ's finding of fact to the extent he did not acknowledge that Vega testified that he could not permanently fix the subject area without a welder. (ALJD 4:50-51; TR 31:16 through TR 32:1, TR 32:9-17).

¹ Throughout this document, the ALJ's decision will be cited as ("ALJD ____"); the transcript of the proceedings before the ALJ will be cited as ("TR ____"); references to Respondent's exhibits at the proceedings before the ALJ will be cited as (R-1, R-2, etc.); references to the General Counsel's exhibits will be cited as (GC-1, GC-2, etc.); and references to the Joint exhibits will be cited as (J-1, J-2, etc.).

7. Respondent excepts to the ALJ's findings of fact to the extent that he did not acknowledge that despite the fact that Vega has a video of the subject dangerous area he did not show it to Villarreal before leaving work on Tuesday, September 25, 2012 when he received his check. (ALJD 5:24-26; TR 33:24 through TR 34:4; TR 58:6-8; TR 61:20 through TR 62:6; TR 62:14-19; TR 227:9-20).
8. Respondent excepts to the ALJ's findings of fact to the extent that he did not acknowledge that Vega failed to tell Trinidad anything about needing a welder to complete the unistrut job. (ALJD 5:24-38; TR 261:5-10; TR 264:5-18; TR 266:13 through TR 267:10).
9. Respondent excepts to the ALJ's findings of fact to the extent that he did not acknowledge that Frankie Sanchez ("Sanchez") fixed the unistrut area without the need of a welder. (ALJD 5:38-45; TR 231:4-6; TR 274:25 through TR 275:2).
10. Respondent excepts to the ALJ's findings of fact to the extent that he did not acknowledge that when Vega left employment on his last day of work that he suspected he was going to be terminated yet failed to show Villarreal the video he had taken of the subject dangerous area before leaving work on Tuesday, September 25, 2012. (ALJD 5:24-26; TR 34:8-22).
11. Respondent excepts to the ALJ's finding that Villarreal was not credible. (ALJD 7:48-50; TR: N/A).
12. Respondent excepts to the ALJ's finding that Vega testified credibly in light of the fact that Vega's testimony is inconsistent with Trinidad's testimony, that the ALJ found credible, and Sanchez' testimony, that the ALJ too found credible. (ALJD 8:3-15; TR 261:5-10; TR 264:5-18; TR 266:13 through TR 267:10; TR 231:4-6; TR 274:25 through TR 275:2).
13. Respondent excepts to the ALJ's finding that General Counsel sustained his initial burden. (ALJD 9:3-4; TR: N/A).
14. Respondent excepts to the ALJ's finding that Villarreal asked Vega on a number of occasions whether he was a union member since Vega's testimony is inconsistent with that finding. (ALJD 9:5-6; TR 25:3-23; TR 67:4-9; TR 67:22 through TR 68:11; TR 69:1-3; TR 72:9-12).
15. Respondent excepts to the ALJ's findings of fact to the extent that he did not acknowledge that Villarreal kept Reeder, a union-affiliated worker, on the job after terminating Vega. (ALJD 9:4-14; TR 136:13-16)
16. Respondent excepts to the ALJ's finding of fact that Villarreal never asked Trinidad about the unistrut in light of the fact that the evidence demonstrates Trinidad was not present when Villarreal saw the unistrut. (ALJD 9:11-13; TR 200:15-20; TR 224:4-6; R-3; R-4).

17. Respondent excepts to the ALJ's finding that Respondent did not sustain its burden of establishing that Vega would have been terminated absent his protected conduct, if any. (ALJD 9:15-25; TR 196:3 through TR 197:20; TR 198:1-3; TR 200:15-20; TR 222:23 through TR 223:23; TR 224:4 through TR 225:11; TR 225:21-25; TR 226:1-22; TR 230:11-14; TR 227:4-8; TR 231:7-17; TR 241:6 through TR 242:1; TR 249:3-7; TR 281:7 through TR 283:11; R-3; R-4).
18. Respondent excepts to the ALJ's finding that he did not find Villarreal's testimony that he was pro-union and wanted to hire Union Workers and work with the Union credible. (ALJD 9:15-19; TR 110:12-22; TR 113:13 through TR 114:19; TR 127:24 through TR 128:19; TR 130:4-8; TR 132:16-20; TR 133:2-8; 213:15-25 and TR 214:5-14; GC-5(a); GC-5(b); GC-5(c)).
19. Respondent excepts to the ALJ's finding that Villarreal was not honest when he told Garcia he couldn't meet with him because he was going out of town and would be out of town. (ALJD 9:19-24; TR 158:2-17).

II. EXCEPTIONS TO THE ALJ'S CONCLUSIONS OF LAW

Respondent excepts to the following specific conclusions of law on the ground that they are not supported by the weight of the record evidence and are contrary to established Board policy and law:

20. Respondent excepts to the ALJ's conclusion that Respondent violated Section 8(a)(1) of the Act by interrogating employees about their Union membership and the Union membership of fellow employees. (ALJD 9:35-36; TR: N/A).
21. Respondent excepts to the ALJ's conclusion that Respondent violated Section 8(a)(1)(3) of the Act by discharging Vega on September 25, 2012 and by not sustaining its burden of establishing that Vega would have been terminated absent his protected conduct, if any. (ALJD 9: 5-25; 9:37-38; TR: N/A).
22. Respondent excepts to the ALJs' conclusion that reinstatement is an appropriate remedy when Vega's position no longer exists since the subject position ended in December 2012. (ALJD 9:45 through 10:5; TR 155:19 through TR 156:1).
23. Respondent excepts to the ALJ's conclusion that reinstatement is an appropriate remedy when there are substantially equivalent positions to Vega's former position since K-Air no longer has commercial work. (ALJD 9:45 through 10:5; TR 240:1-15).
24. Respondent excepts to the ALJ's conclusion that reinstatement is an appropriate remedy when Vega committed misconduct when he lied on his employment application about his criminal history. (ALJD 9:45 through 10:5; J-1).

25. Respondent excepts to the ALJ's conclusion that reinstatement is an appropriate remedy when Vega is no longer qualified to work for K-Air because he is a registered sex offender with a charge of attempted aggravated sexual assault on a 13-year old child. (ALJD 9:45 through 10:5; TR: N/A)
26. Respondent excepts to the ALJ's conclusion that reinstatement is an appropriate remedy in light of the fact that K-Air is only doing residential AC work; Vega is registered sex offender; and K-Air would be negligent in allowing a known sex offender to enter the homes of its unsuspecting residential clients. (ALJD 9:45 through 10:5; TR: N/A).
27. Respondent excepts to the ALJs' conclusion that loss of earnings and other benefits should be computed on a quarterly basis from the date of discharge to the date of proper offer of reinstatement because the LA Fitness job in question ended mid-December 2012; there are no other similar commercial jobs available for Vega; and reinstatement is not appropriate. (ALJD 9:45 through 10:4; TR 155:19 through 156:1; TR 240:1-15).

III. EXCEPTIONS TO THE ALJ'S ORDER

In light of all of the foregoing specific exceptions to the ALJ's decision, Respondent excepts as follows to the ALJ's Order on the ground that they are not supported by the weight of the record evidence and are contrary to established Board policy and law:

28. Respondent excepts to the ALJ's Remedy as noted above in Exception numbers 21-27. (ALJD 9:45 through 10:4).
29. Respondent excepts to the ALJs' Order from page 10:25 through page 11:20.

Respectfully submitted,

GOODE CASSEB JONES
RIKLIN CHOATE & WATSON


Melissa Morales Fletcher

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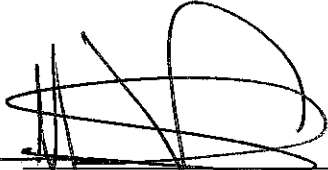
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CERTIFICATE OF SERVICE

I hereby certify that in accordance with the NLRB's rules pertaining to electronic filings and NLRB Rule 102.114(i), a true and correct copy of the foregoing Respondent's Exceptions to ALJ's Decision was timely filed via the NLRB E-filing system and was served on the following on the date below by undersigned counsel for K-Air Corporation via electronic mail:

Roberto Perez:	Roberto.Perez@nlrb.gov
Jonathan Elifson:	Jonathan.Elifson@nlrb.gov
Gilbert Garcia:	ggarcia@smw67.org

Dated this 26th day of June 2013.



Melissa Morales Fletcher